

Federal Personnel Manual System

FPM Letter 930-16

SUBJECT: Temporary Reemployment of Retired
Administrative Law Judges

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Chapter 930

RETAIN UNTIL SUPERSEDED

Washington, D. C. 20415

April 30, 1985

Heads of Departments and Independent Establishments

1. Public Law 98-224, signed March 2, 1984, amended section 3323(b) of title 5, United States Code, to permit the temporary reemployment of retired Administrative Law Judges (ALJs) under regulations promulgated by the Office of Personnel Management (OPM). Such temporary reemployment is to be for the purpose of conducting formal administrative hearing proceedings under the provisions of 5 U.S.C. 556-557.

2. Final OPM regulations implementing this amendment were published in the Federal Register on April 18, 1985 with an effective date 30 days following publication. A copy of these regulations, a new subsection 930.216 of Subpart B, Part 930, Title 5, Code of Federal Regulations, is attached.

3. The new regulations provide that temporary reemployment of retired ALJs will be permitted in those situations where an agency may wish to reemploy an ALJ to conduct further formal proceedings on a case previously assigned to the ALJ before retirement, which has not been completed or which has been remanded by a higher appellate authority. Reemployment of retired ALJs will also be permitted to conduct formal proceedings for one or more specified new cases, or for new cases assigned in normal rotation to the extent practicable. In all cases, agencies must obtain OPM approval for the reemployment of retired ALJs. Reemployment of retired ALJs will be approved by OPM only if OPM finds that (a) the temporary use of an administrative law judge is warranted by workload and staffing requirements, and (b) regularly employed ALJs with necessary qualifications are not available in any agency.

4. Retired ALJs receiving annuity from the Civil Service Retirement and Disability Fund will be eligible for temporary reemployment as ALJs if they (a) have served with absolute status as ALJs under 5 U.S.C. 3105 and (b) have met qualification and examination requirements in OPM Examination Announcement No. 318 for ALJ positions, including the requirement to maintain a current license to practice law under the laws of a state, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the Constitution. Retired ALJs, having already been found by OPM to have met the requirements of this examination announcement would not have to take the examination again.

5. Retired ALJs who are interested in temporary reemployment must notify the Office of Administrative Law Judges (OALJ) at OPM in writing of their availability, specifying their full name, address, telephone number and agencies worked for as an ALJ and jurisdictions in which they are authorized to practice law. An SF 171, Application for Federal Employment, or a personal resume may be submitted if desired, but a simple letter will do. Submission of such a notice to OALJ is strictly voluntary. OALJ is working with interested bar associations to alert retired ALJs to this notice requirement. OALJ will maintain a master list of retired ALJs who submit such a notice and who meet the qualification requirements of paragraph 4 above.

6. Agencies which wish to seek OPM approval of the temporary reemployment of retired ALJs must submit a written request to OALJ. The request must (a) identify the statutory authority under which formal proceedings are to be conducted, (b) demonstrate, with workload or other appropriate information, that the agency is occasionally or temporarily understaffed, (c) specify the tour of duty, location and period of time or particular case(s) for the requested

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reemployment, and (d) describe any special qualifications desired in the retired ALJ whom it wishes to reemploy, such as experience in a particular field, agency or substantive area of law.

7. Upon approval of an agency request to temporarily reemploy a retired ALJ, OALJ will identify from a master list of retired ALJs who have notified OPM of their availability for reemployment those ALJs who meet agency qualification requirements. Such retired ALJs will be identified for referral in rotation to the extent practicable. OALJ will then forward the agency a list of their names, along with their addresses, telephone numbers, agencies served as ALJs and jurisdiction in which licensed to practice law. Finally, it will be up to the agency to conduct the normal personnel interviews and/or investigations prior to selecting one of the referred individuals for actual temporary reemployment.

8. Retired ALJs who are temporarily reemployed as ALJs in accordance with the procedures in this letter will be known as Senior ALJs.

9. Reemployment of retired ALJs as Senior ALJs shall be for either (a) a specified period not to exceed 1 year, or (b) such period as may be necessary for the reemployed ALJ to conduct and complete the hearing of one or more specified cases and, when needed, to issue decisions therein.

10. Hours of duty, administrative support services, and travel reimbursement for Senior ALJs will be determined by the employing agency in accordance with the same rules and procedures that are generally applicable to employees.

11. A reemployed retired ALJ, or Senior ALJ, serves subject to the same limitations on performance appraisal and removals as any other ALJ. An agency may not rate the performance of a Senior ALJ. Actions may not be taken against Senior ALJs during the period of reemployment, except for good cause established and determined by the Merit Systems Protection Board after opportunity for a hearing on the record before the Board, as provided in 5 C.F.R. 1201.131 through 1201.136. However, if the agency runs out of work before a temporary period of reemployment ends, the agency may ask OALJ to reduce the period of reemployment and the Senior ALJ may simply be separated at an earlier date agreed on by the agency and OALJ.

12. A Senior ALJ will be paid by the employing agency at the current rate of pay for the grade at which the duties to be performed have been classified and at the step of that grade which is nearest (when rounded up) to the highest previous grade and step attained as an ALJ before retirement. In other words, a retired GS-15 ALJ will be reemployed in a GS-15 ALJ position at the highest step of the GS-15 grade level attained before retirement. Similarly, a retired GS-16 will be reemployed in a GS-16 ALJ position at the highest step of the GS-16 grade level attained before retirement. Also, a retired GS-16 ALJ may be reinstated in a GS-15 ALJ position at that step of the GS-15 grade level which is nearest (when rounded up) to the highest step of the GS-16 ALJ position attained before retirement. Salary will be paid at current rates for such grades and steps; however, an amount equal to the annuity allocatable to the period of actual employment must be deducted from a Senior ALJ's pay and deposited in the Treasury of the United States to the credit of the Civil Service Retirement and Disability Fund.



Donald J. Devine
Director

Rules and Regulations

Federal Register

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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510. The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 930

Programs for Specific Positions and Examination (Miscellaneous)

AGENCY: Office of Personnel Management.

ACTION: Final regulations.

SUMMARY: The Office of Personnel Management (OPM) is issuing regulations that implement Pub. L. 98-224, signed March 2, 1984. This law amended section 3323(b) of Title 5, United States Code, to permit the temporary reemployment of retired Administrative Law Judges (ALJs) under regulations promulgated by OPM. These final rules will help agencies deal with temporary, irregular workloads for ALJs. **EFFECTIVE DATE:** May 20, 1985.

FOR FURTHER INFORMATION CONTACT: Craig B. Pettibone, Assistant Director for Administrative Law Judges, (202) 632-5677.

SUPPLEMENTARY INFORMATION: In the October 31, 1984, Federal Register, OPM proposed to add a new § 930.216 to Subpart B, Part 930, Title 5 of the Code of Federal Regulations, to permit the temporary reemployment of retired ALJs to conduct formal administrative hearing proceedings in accordance with 5 U.S.C. 556 through 557. Interested parties were given until November 30, 1984, to submit written comments concerning this proposal.

Nineteen written comments and a few telephone comments were received by OPM. The Senior Judges Committee of the National Conference of Administrative Law Judges, Judicial Administration Division, American Bar Association, submitted a most comprehensive set of comments and met with OPM staff to discuss them. Eleven retired ALJs submitted comments that

generally paralleled the comments of the Senior Judges Committee. Five agency chief ALJs and one agency personnel director submitted comments. In addition, a former director of the Office of Administrative Law Judges in the old U.S. Civil Service Commission submitted comments.

The commenters generally supported the promulgation of regulations permitting the reemployment of retired ALJs. However, they raised six issues that are listed and discussed below.

1. *Should retired ALJs apply directly to agencies for reemployment or apply first to OPM for referral to agencies?* Several commenters took the position that applicants for reemployment as retired ALJs should be required to apply first to OPM rather than directly to the employing agency as proposed by OPM under 5 CFR 930.216(b). They argued that such a procedure was necessary to give the public the assurance required by the Administrative Procedure Act (APA) that an agency would not be selecting a particular ALJ to hear a particular case or influence the outcome of an assigned case in any way. They also argued that requiring agencies to assign cases in general rotation as OPM had proposed was not a sufficient assurance to the public that an impartial retired ALJ would be appointed in the first place. Therefore, they argued that OPM should provide an application procedure that paralleled that required by the APA for applicants for regular ALJ positions. In other words, applicants should first apply to OPM for reemployment, and OPM should then provide employing agencies in response to their request lists of applicants who meet their qualification requirements. In response to the comments received, OPM has modified the proposed regulations so that the final regulations provide that retired ALJs who are interested in reemployment should first notify OPM in writing. OPM will compile a list of such retired ALJs and will refer lists of qualified retired ALJs to agencies that request them. The names of retired ALJs referred from OPM's master list will be rotated to the extent practicable.

2. *Should retired ALJs be required to reestablish their qualifications in accord with OPM Examination Announcement No. 318 for ALJs?* A number of commenters interpreted OPM's proposed regulations as if they

would have required retired ALJs to reestablish their qualifications by retaking the ALJ examination. OPM did not and does not anticipate requiring ALJs to retake the ALJ examination to qualify for reemployment. OPM simply proposed to require that the retired ALJs who wanted to become reemployed would have to demonstrate that they had established eligibility in accordance with the qualification and examination requirements of OPM Examination Announcement No. 318 for ALJs. This Announcement was first published in 1983, but was revised in 1984. Retired ALJs having already passed the requirements of this examination announcement would not have to retake it. They would simply have to show that since retirement they continued to meet the one qualification requirement set out in the examination announcement that relates to current status rather than past achievement. Specifically, they would have to show that they continue to be duly licensed to practice law under the laws of a state, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the Constitution. This is the same eligibility requirement placed on former ALJs who seek to be reinstated under 5 CFR 930.207. Such an eligibility requirement is a straightforward assurance to the public that retired ALJs have met the same eligibility requirements as regularly employed ALJs and have maintained proficiency in their legal knowledge, skills, and abilities. Accordingly, OPM is keeping this requirement in the rules for reemployment of retired ALJs.

3. *Should reemployment for the period of time necessary to conduct and complete one or more specified cases be limited to cases "assigned but not completed before retirement"?* Some commenters questioned why § 930.216(f)(2) of OPM's proposed regulations would have limited reemployment for the period of time necessary to conduct and complete one or more specified cases "assigned but not completed before retirement." They pointed out that such a limitation was not included in the statutory language of 5 U.S.C. 3323(b), as amended. They also added that an agency might wish from time to time to reemploy a retired ALJ indefinitely for assignment to a particular new case rather than for a particular period of time for assignment

to cases in normal rotation as permitted under § 930.216(f)(1). OPM had included the limitation because it had proposed that retired ALJs apply for reemployment directly to the employing agencies and that the employing agencies recommend to OPM a specific retired ALJ from reemployment. If the agencies were to be given such freedom to pick their own retired ALJs, they could not also be permitted to pick a particular case for assignment to them without violating the APA requirement that an agency not pick a particular ALJ for a particular case, and assign all cases in rotation to the extent practicable. However, in view of the revision of the final regulations to provide for retired ALJs to apply for reemployment by first notifying OPM, and for OPM to forward a list of qualified retired ALJs to agencies in response to their requests for reemploying unnamed retired ALJs, OPM has deleted this limitation from the final regulations.

4. *Is the language of § 930.216(h) (§ 930.216(g) in the proposed regulations) concerning the assignment of cases to reemployed ALJs either to hear a case(s) assigned but not completed before retirement, or to hear cases in normal rotation to the extent practicable, permissive or mandatory?* A few commenters expressed concern that the use of the word "shall" in this subsection of the regulations would have imposed an obligation on an agency to automatically reemploy a retired ALJ to complete a case that was assigned but not completed before retirement. This concern was raised in the context of 5 U.S.C. 554(d) that requires in part "The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency." OPM believes that this concern can be eliminated by changing the word "shall" to "may" as it has done in the final regulations. Also, OPM is not aware of anything in the legislative history of 5 U.S.C. 3323(b) that would suggest that an agency would be obligated to reemploy a retired ALJ to finish an uncompleted case. Such reemployment to complete an uncompleted case is a matter of agency discretion. Further, we assume that most agencies will continue to try to have their ALJs complete assigned cases before retirement, and that cases assigned but not completed before retirement will generally arise infrequently in connection with the

remand of cases from a higher appellate body after an ALJ has retired.

5. *What happens if a retired ALJ reemployed for a particular period of time to hear an agency's cases in normal rotation finds during such period of time that the services of the additional ALJ are no longer required to handle pending workloads?* One agency asked whether, in such a situation, an agency could terminate the reemployment without proposing removal in an on the record hearing before the Merit Systems Protection Board under 5 U.S.C. 7521. Such a question should arise rarely, if at all, if the agency's request to reemploy a retired ALJ was fully and properly justified. Also, in accordance with the change made in the final regulations under issue 3 above, such a situation could be avoided by an agency if the agency simply reemploys a retired ALJ to hear a specific case or cases for such period of time as it takes to complete them. However, if the situation did arise, the agency could ask OPM to approve a reduction in the period of reemployment. And, if such a request is approved, the period of reemployment could be terminated when the need for the reemployed ALJ's services end.

6. *How is the pay to be set for the retired ALJ who is reemployed?* Several commenters interpreted proposed § 930.216(j) as if it would have limited the pay for a retired ALJ to the highest dollar rate of pay received as an ALJ before retirement. This was not the intent of the regulations. The final regulation has been clarified to make it understood that the retired ALJ will be paid by the employing agency at "the current rate of pay for the grade at which the duties to be performed have been classified and at a step of that grade that is nearest (when rounded up) to the highest previous grade and step attained as an Administrative Law Judge before retirement." For example, retired GS-16 ALJs would be reinstated in GS-16 ALJ positions at the highest step of the GS-16 grade level they had previously attained as ALJs before retirement. And, they would be paid at that step of the GS-16 grade level at current salary rates. Similarly, GS-15 ALJs would be reinstated in GS-15 ALJ positions at the highest step of the GS-15 grade level they had previously attained as ALJs before retirement. And, they would be paid at that step of the GS-15 grade level at current salary rates. Also, retired GS-16 ALJs would be reinstated in GS-15 ALJ positions at that step of the GS-15 grade level that is nearest (when rounded up) to the highest step of the GS-16 ALJ position

attained before they retired. Likewise, they would be paid at current salary rates for that step at the GS-15 grade level. However, an amount equal to the annuity allocable to the period of actual employment will be deducted from his or her pay and deposited in the Treasury of the United States to the credit of the Civil Service Retirement and Disability Fund.

E.O. 12291 Federal Regulation

I have determined that this is not a major rule as defined under section 1(b) of E.O. 12291, Federal Regulation.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it only affects Federal employees.

List of Subjects in 5 CFR Part 930

Administrative practice and procedure, Government employees, Motor vehicles.

Office of Personnel Management,
Donald J. Devine,
Director.

Accordingly, OPM amends 5 CFR Part 930 as follows:

PART 930—PROGRAMS FOR SPECIFIC POSITIONS AND EXAMINATIONS (MISCELLANEOUS)

Subpart B—Appointment, Pay and Removal of Administrative Law Judges

1. The authority for Subpart B reads as follows:

(5 U.S.C. 1305, 3105, 3344, 5335, 5372, 7521, unless otherwise noted)

2. Section 930.216 is added to read as follows:

§ 930.216 Temporary Reemployment: Senior Administrative Law Judges.

(a) Subject to the requirements and limitations of this section, an annuitant, as defined by section 8331 of Title 5, United States Code, receiving an annuity from the Civil Service Retirement and Disability Fund (1) who has served with absolute status as an administrative law judge under section 3105 of that Title; and (2) who has met current qualification and examination requirements set forth in OPM Examination Announcement No. 318 (including the requirement to maintain a current license to practice law under the laws of a state, the District of Columbia, the Commonwealth of Puerto Rico, or any territorial court established under the Constitution), may be temporarily

reemployed as an administrative law judge by an agency that has temporary, irregular workload requirements for conducting proceedings in accordance with sections 556 and 557 of that title. Such retired administrative law judges who are so reemployed will be known as senior administrative law judges.

(b) Retired administrative law judges who meet the requirements of paragraph (a) of this section and who are available for temporary reemployment must notify OPM in writing of their availability, giving their full name, address, telephone number, name of the agencies where the person served as an ALJ, and jurisdictions in which they are currently licensed to practice law. OPM will maintain a master list of such retired administrative law judges for use in responding to agency requests for such judges.

(c) An agency that wishes to temporarily reemploy administrative law judges must submit a written request to OPM. The request shall—

(1) Identify the statutory authority under which the administrative law judge is expected to conduct proceedings;

(2) Demonstrate that the agency is occasionally or temporarily understaffed;

(3) Specify the tour of duty, location, period of time, or particular case(s), for the requested reemployment; and

(4) Describe any special qualifications desired in the retired administrative law judge that it wishes to reemploy, such as experience in a particular field, agency, or substantive area of law.

(d) OPM will approve agency requests for temporary reemployment of retired administrative law judges for a specified period or periods provided:

(1) The requesting agency fully justifies that it requires the use of an administrative law judge and that it is occasionally or temporarily understaffed; and

(2) No other administrative law judge with the appropriate qualifications is available through OPM under § 930.213 of this subpart to perform the occasional or temporary work for which reemployment is requested.

(e) Upon approval of an agency request to reemploy a retired administrative law judge, OPM will select from its master list of retired administrative law judges, in rotation to the extent practicable, those retired judges who it determines meet agency requirements. OPM will then provide a list of such individuals to the requesting agency and the agency must then select from that list a retired administrative law judge for reemployment.

(f) Reemployment of retired administrative law judges is subject to investigation of suitability in accordance with §§ 731.201 through 731.303 of this chapter. It is also subject to conflict of interest and security investigation requirements by the appointing agency.

(g) Reemployment as senior administrative law judges will be for either (1) a specified period not to exceed 1 year; or (2) such periods as may be necessary for the reemployed administrative law judge to conduct and complete the hearing of one or more specified cases and issue decisions therein. Upon agency request, OPM may either reduce or extend such period of reemployment, as necessary, to coincide with changing staffing requirements.

(h) An agency may assign its senior administrative law judges to either (1) hear one or more specific cases; or (2) hear, in normal rotation to the extent practicable, a number of cases on its docket and issue decisions therein.

(i) Hours of duty, administrative support services, and travel reimbursement for senior administrative law judges will be determined by the employing agency in accordance with the same rules and procedures that are generally applicable to employees.

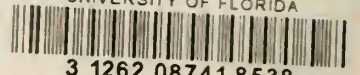
(j) A senior administrative law judge serves subject to the same limitations on performance appraisal and removal as any other administrative law judge employed under this subpart and section 3105 of title 5, United States Code. An agency will not rate the performance of a senior administrative law judge. Actions may not be taken against senior administrative law judges during the period of reemployment, except for good cause established and determined by the Merit Systems Protection Board after opportunity for a hearing on the record before the Board as provided in §§ 1201.131 through 1201.136 of this Title.

(k) A senior administrative law judge will be paid by the employing agency the current rate of pay for the grade at which the duties to be performed have been classified and at a step of that grade that is nearest (when rounded up) to the highest previous grade and step attained as an administrative law judge before retirement. However, an amount equal to the annuity allocatable to the period of actual employment will be deducted from his or her pay and deposited in the Treasury of the United States to the credit of the Civil Service Retirement and Disability Fund.

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